In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES, PETITIONER, *v.* WONG YOU, WONG CHEEN (WONG CHUN), Hoen Chee (Hon Chee), Wong Mow Sue (Wong Yip), and Ju Fong.	No. ——.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF THEREON.

Comes now the Solicitor General, on behalf of petitioner, and respectfully prays that a writ of certiorari be issued to review the judgment of the Circuit Court of Appeals in this case; and in support of this petition says:

QUESTION PRESENTED.

The question presented is whether the Secretary of Commerce and Labor may deport Chinese aliens, under the immigration laws, who surreptitiously enter the United States at other than a designated port of entry, or whether the right of such aliens to remain in the United States must first be determined judicially under the Chinese-exclusion laws. The

District Court upheld the authority of the Secretary in this respect, but the Circuit Court of Appeals reversed its judgment.

The effect of this decision is to put a premium upon the surreptitious entry of Chinese into the United States, and practically operates to defeat both laws.

STATEMENT OF CASE.

The respondents, Wong You, Wong Cheen, and Hoen Chee, were brought by two white men in an automobile from Montreal, Province of Quebec, to Owls Head, N. Y., about 15 miles from the Canadian boundary (R., 19–21, 31, 37, 38), where they took a train, upon which they were later arrested at Utica, N. Y. (R., 13, 27–28, 34). They were to pay $150 to $170 each for being brought into this country (R., 20, 31, 38).

Wong Mow Sue and Ju Fong likewise came from Canada, and were taken into custody while on a canal boat at Rouses Point, N. Y. (R., 41, 42, 48, 49, 52).

After a full and fair hearing in each case (R., 13–54) the Chinese and immigrant inspector found that respondents were Chinese subjects; that they entered the United States surreptitiously and without examination at places not designated as ports of entry, and that, therefore, they were in this country in violation of the immigration act (R., 26, 33, 40, 51, 55).

The Acting Secretary of Commerce and Labor approved the findings of the inspector and issued warrants of deportation (R., 8) under the provisions of sections 20, 21, and 36 of the immigration

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act, which expressly authorize the deportation of any aliens entering the United States at other than the designated ports of entry.

Application was then made on behalf of the Chinamen to the District Court for the Northern District of New York for a writ of habeas corpus, it being alleged that their detention was unlawful simply because they were born in the United States and were citizens thereof. (R., 1.) The writ was issued, but was dismissed as to Hoen Chee because his case had not been passed upon by the Secretary of Commerce and Labor. (R., 79.) As to the others, the District Court held that the immigration act was applicable to Chinese as well as other aliens, and that, having entered this country in violation of its provisions, they might properly be deported on the warrants of the Secretary of Commerce and Labor. (176 Fed., 933.) The writ was accordingly dismissed and petitioners remanded to the custody of the immigration officials. (R., 79–98.)

The Circuit Court of Appeals reversed the judgment of the District Court and ordered the Chinamen released from custody. The ground of its decision was that, as the record indicated that petitioners were laborers and apparently subject to deportation under the Chinese-exclusion laws, they could not be deported under the immigration laws unless proceedings to deport them under the Chinese-exclusion laws should be unsuccessful. (181 Fed., 313.)

The statutes and regulations bearing on the question involved are set out in the appendix hereto.

OPY

ARGUMENT.

I.

The Circuit Court of Appeals held that the immigration act—

> although in its terms including all aliens, applies only to the Chinese aliens who are not subject to removal by the particular Chinese enactments.

That court also said—

> It appears from the meager record that these petitioners are Chinese laborers and—if the Government's contentions be well founded—that they are aliens and subject to deportation in accordance with the provisions of the statutes relating to the Chinese.

The "meager record" from which the Circuit Court of Appeals said it appeared that the petitioners were Chinese laborers consisted of the petition for the writ of habeas corpus, the return of the immigration officer to the writ, and the proceedings before the Deparment of Commerce and Labor leading up to the orders of deportation, a copy of which was attached to and made a part of the return. The return (R., 4) and proceedings before the Department (R., 13 et seq.) merely show that the petitioners were found to be aliens and to have surreptitiously entered the United States at other than a designated port of entry, and that they were ordered deported

for these reasons alone. The inquiry at the hearing accorded petitioners by the Department (R., 13 et seq.) was directed solely to determining these facts. The question whether they were laborers or not was not raised or considered by the Department, nor was it raised on the petition for the writ of habeas corpus or considered by the District Court. Anything in the record indicating that petitioners were laborers and possibly subject to deportation under the Chinese exclusion laws was brought out incidentally in the course of the hearing given them by the department, which, as stated, was devoted exclusively to the determination of whether they were aliens who had surreptitiously entered the United States.

That this is a correct statement of the facts of this case further appears from the opinion of the District Court. (R., 79 et seq.) The conclusion of the Circuit Court of Appeals, therefore, that—

> If this contention of the Government be well founded, we have two statutes in force prescribing different methods of procedure for the deportation of alien Chinese laborers—

is clearly erroneous. Petitioners were not and could not have been arrested within the country and ordered deported by the Secretary of Commerce and Labor under the immigration laws simply because they were Chinese laborers. Chinese *laborers*, unlawfully within the United States, can only be arrested and deported *as such* under the exclusion laws. There is therefore no occasion for the application of

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the rule *generalia specialibus non derogant*, relied on by the Circuit Court of Appeals.

But while holding that petitioners were unlawfully held under the immigration laws, the Circuit Court of Appeals said that—

> If, however, proceedings should be instituted under the Chinese statutes and it should be made to appear that the petitioners are not subject to deportation thereunder, this opinion and the discharge of the petitioners in the present proceeding will not prejudice the institution of another proceeding under the immigration act.

The substance of the judgment of the Circuit Court of Appeals is, therefore, that whenever a Chinese alien is found to have entered or to be within the United States in violation of the immigration laws, and there is some ground to believe that he is a Chinese laborer and therefore subject to deportation under the Chinese-exclusion laws, the Government must first settle that question through the judicial proceedings provided for by those laws before it can undertake to deport him under the immigration laws. In other words, although the Chinese alien may be subject to deportation under both laws, the Government is compelled to proceed first under the Chinese-exclusion laws in the case of Chinamen who are apparently laborers.

It is to be observed that the ruling of the Circuit Court of Appeals applies to Chinese aliens afflicted with loathsome diseases or otherwise disqualified

from admission under the immigration laws. Thus, the court said:

> This conclusion makes no distinction in favor of the Chinese. Chinese laborers are excluded by the Chinese act. All other Chinese persons not being excluded by that act are subject to the provision of the immigration act. A Chinese laborer, with or without a loathsome disease, can not enter at all. The Chinese act governs the case. A Chinese merchant would not be excluded by that act, but would be excluded by the immigration act if he had a loathsome disease or other disability prescribed in such enactment—

The statement of the Circuit Court of Appeals that—

> a Chinese laborer, with or without a loathsome disease, can not enter at all.

is no answer to the Government's position. It is true he can not enter *legally*, but he can and does enter *surreptitiously*, and the point is that, under the ruling of the Circuit Court of Appeals, when he does so enter, he must be allowed to remain, although afflicted with a loathsome disease and ultimately subject to deportation under the immigration laws, until the question whether he is a laborer or not is judicially determined. Not until it is judicially determined that he is not within the Chinese-exclusion laws can he be deported under the immigration laws. The error of such a construction is manifest. If subject to deportation under either law, it is immaterial, legally, under which such proceedings are first instituted.

II.

The application of the immigration laws to Chinese aliens is well settled. (*Ex parte Lee Sher Wing*, 164 Fed., 506; *Looe Shee* v. *North*, 170 Fed., 566; *Ex parte Li Dick*, 174 Fed., 674, 176 Fed., 998; *Haw Moy* v. *North*, 183 Fed., 89; *Hoo Choy* v. *North*, 183 Fed., 92; 24 Op. A. G., 706.)

Ex parte Li Dick (supra) was also a case of the surreptitious entry of a Chinese alien, who was ordered deported by the Secretary of Commerce and Labor. Referring to the provision of the immigration act that—

> this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent. * * *

District Judge Ray, who also decided the present case in the District Court, said (176 Fed., 1002):

> This is not a declaration that the act and all or any of its provisions are inapplicable to Chinese aliens. If they enter, they must enter at the designated ports of entry. If they enter, they must submit to the examination and inspection provided for all aliens. A Chinese anarchist, or a Chinese afflicted with one of the loathsome or infectious diseases mentioned in the act, is no more entitled to admission than is an Italian or Japanese alien. If a Chinese alien sees fit to enter surreptitiously and in violation of law, he is then illegally in the United States, and Congress has confided to the Department of Commerce

and Labor the power and duty of ascertaining the fact and, if shown, of deporting the offender. In *Looe She* v. *North* (170 Fed., 572; 95 C. C. A., 646; and 24 Op. Atty. Gen., 706) this power, as to Chinese aliens, is upheld. This court considered the question in *Ex parte Li Dick* (D. C.) 174 Fed., 674, and on this point, after a full examination and further consideration, adheres to the proposition that a Chinese alien who surreptitiously enters the United States in violation of the immigration act may be deported under the provisions of that act, *and that such an entry so gained does not entitle him to a hearing before a United States judge or commissioner.* I do not think the law is in such shape that a Chinese alien who surreptitiously enters, and thereby violates and evades compliance with the immigration law, thereby also evades the Department of Commerce and Labor and its jurisdiction to deal with him under the provisions of that act and becomes entitled to a trial and examination before a justice, judge, or a commissioner, under the provisions of the Chinese-exclusion laws. The two acts can stand and be enforced together. Two remedies may be provided for the same illegal act, and either, or, in some cases, both, enforced. If Congress had intended to exclude Chinese aliens from the operation of the immigration laws, it would have done so by apt words. It would have been easy to do so. We find no word or expression indicating such a purpose.

The immigration act of March 3, 1893 (27 Stat., 569, 571), provided:

> That this act *shall not apply* to Chinese persons.

In the act of 1903 (32 Stat., 1213, 1221), section 36, and the act of 1907 (34 Stat., 898, 911) this clause was changed to read:

> That this act shall not be construed *to repeal, alter, or amend* existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent.

This change indicates the intent of Congress that the immigration act should apply to Chinese aliens, although not affecting the operation of the exclusion laws, and such has been the practical and judicial construction of this legislation, as appears from the cases above cited.

The Circuit Court of Appeals in this case recognizes the application of the immigration laws to certain Chinese aliens, but holds that they do not apply to Chinese aliens who are laborers or otherwise excluded by the Chinese-exclusion laws. The Government, however, is not contending for the right of the Secretary of Commerce and Labor, under the immigration laws, to deport alien Chinese laborers as such, but simply that alien Chinese who have entered the United States in violation of the immigration, as well as possibly the Chinese-exclusion laws, may be deported under the former, if the Government shall so elect, without the necessity of first having it judicially determined whether the exclusion laws are also applicable to them.

III.

The decision of the Circuit Court of Appeals puts a premium upon the surreptitious entry of Chinese.

Before a Chinese alien can lawfully enter the United States he must undergo examination under both the Chinese-exclusion and the immigration laws at the proper port of entry. This is expressly so provided in rule 3 of the Secretary of Commerce and Labor governing the admission of Chinese, which is above set forth (page 8); that rule, for administrative reasons, requiring that Chinese aliens shall *first* be examined under the immigration laws and regulations.

If, therefore, a Chinese alien seeks to enter the United States at a designated port of entry and is found disqualified under the immigration laws because afflicted with a loathsome disease or for other causes, he could and would be immediately deported by order of the Secretary of Commerce and Labor without inquiring whether he is also subject to deportation under the Chinese-exclusion laws. Under such circumstances the latter inquiry becomes unnecessary. According to the ruling of the Circuit Court of Appeals in this case, however, if a Chinese alien surreptitiously enters the United States at other than a designated port of entry, the Secretary of Commerce and Labor is powerless to deport him under the immigration laws until it has been judicially determined that he is not within the Chinese-exclusion laws. A premium is therefore put upon the surreptitious entry of Chinese.

The question presented in this case is one of considerable importance in the administration of both the Chinese-exclusion and the immigration laws. It has been for years past the practice of Chinese aliens to enter the United States surreptitiously from Canada and Mexico. Judicial proceedings for their deportation under the Chinese-exclusion laws are attended with delay and for various reasons are frequently futile. Manifestly, Chinese persons surreptitiously entering the United States at other than designated ports of entry are entitled to no special consideration, especially as the purpose of such surreptitious entry is simply to evade the operation of both the Chinese-exclusion and the immigration laws.

It is respectfully submitted, therefore, that the decision of the Circuit Court of Appeals is erroneous, and that a writ of certiorari should issue as prayed.

FREDERICK W. LEHMANN,
Solicitor General.

WILLIAM R. HARR,
Assistant Attorney General.

APRIL, 1911.

APPENDIX.

STATUTES.

The provisions of the immigration act of February 20, 1907 (34 Stat., 898), in pursuance of which the warrants of deportation were issued, are as follows:

> SEC. 36. That all aliens who shall enter the United States except at the seaports thereof, or at such place or places as the Secretary of Commerce and Labor may from time to time designate, shall be adjudged to have entered the country unlawfully and shall be deported as provided by sections twenty and twenty-one of this act. * * *
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> SEC. 20. That any alien who shall enter the United States in violation of law, and such as become public charges from causes existing prior to landing, shall, upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States. * * *
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> SEC. 21. That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this act, or that an alien is subject to deportation under the provisions of

> this act or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came, as provided by section twenty of this act. * * *
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> SEC. 43. * * * All acts and parts of acts inconsistent with this act are hereby repealed: *Provided,* That this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent. * * *

The Chinese-exclusion act of May 6, 1882 (22 Stat., 58), as amended by section 1 of the act of July 5, 1884 (23 Stat., 115), and continued in force by the acts of April 29, 1902 (32 Stat., 176), and April 27, 1904 (33 Stat., 394, 428), provides that:

> * * * It shall not be lawful for any Chinese laborer to come from any foreign port or place, or having so come to remain within the United States.

Section 12 of the act of May 6, 1882 (22 Stat., 58), as amended by the act of July 5, 1884 (23 Stat., 115), provides:

> That no Chinese person shall be permitted to enter the United States by land without producing to the proper customs officer [Chinese inspector] the certificate in this act required of Chinese persons seeking to land from a vessel.
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> And any Chinese person found unlawfully within the United States shall be caused to be

> removed therefrom to the country from whence he came, and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully entitled to be or to remain in the United States. * * *

Section 7 of the act of September 13, 1888 (25 Stat., 477), reenacted by the acts of April 29, 1902 (32 Stat., 176), and April 27, 1904 (33 Stat., 394, 428), provides:

> * * * And no Chinese laborer shall be permitted to reenter the United States without producing to the proper officer of the customs [proper officer in charge] at the port of such entry the return certificate herein required. A Chinese laborer possessing a certificate under this section shall be admitted to the United States only at the port from which he departed therefrom, and no Chinese person, except Chinese diplomatic or consular officers, and their attendants, shall be permitted to enter the United States except at the ports of San Francisco, Portland, Oregon, Boston, New York, New Orleans, Port Townsend, or such other ports as may be designated by the Secretary of the Treasury [Commerce and Labor].

Section 13 of said act of 1888, likewise reenacted by the above-mentioned acts of 1902 and 1904, provides:

> That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its Territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on

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behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. * * *

RULES AND REGULATIONS.

Under the provisions of the immigration act, the following rule has been issued by the Department of Commerce and Labor:

RULE 24. *Ports of entry, Canada.*—In accordance with section 36, the following are named as Canadian border ports of entry for aliens; and any alien who enters the United States across such border at any other point shall be deemed to have entered the country unlawfully, and shall be arrested and deported under sections 20, 21, and 35 of said act, in the manner provided by rule 34 hereof: Eastport, Calais, Vanceboro, Fort Kent, Fort Fairfield, Van Buren, Houlton, and Lowelltown, Me.; Beechers Falls, N. H.; Island Pond, Newport, Richford, St. Albans, Swanton, and Alburg, Vt.; Rouses Point, Malone, Fort Covington, Nyando, Ogdensburg, Morristown, Clayton, Cape Vincent, Charlotte, Lewiston, Niagara Falls, and Buffalo, N. Y.; Detroit, St. Clair, Port Huron, and Sault Ste. Marie, Mich.; Duluth, Ranier, International Falls, Warroad, Beaudette, and Noyes, Minn.; Pembina, Neche,

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Walhalla, Portal, and St. John, N. Dak.; Sweet Grass and Gateway, Mont.; Porthill and Eastport, Idaho; Marcus, Oroville, Sumas, and Blaine, Wash.

The following rules have been issued by that department governing the admission of Chinese:

RULE 1. No Chinese person, other than a Chinese diplomatic or consular officer and attendants, shall be permitted to enter the United States elsewhere than at the ports of San Francisco, Cal.; Portland, Oreg.; Boston, Mass.; New York, N. Y.; New Orleans, La.; Port Townsend and Seattle, Wash.; Honolulu, Hawaii; San Juan and Ponce, P. R.; San Diego, Cal.; and Tampa, Fla.

RULE 3. Chinese aliens shall be examined as to their right to admission to the United States under the provisions of the law regulating immigration as well as under the laws relating to the exclusion of Chinese. As the immigration act relates to aliens in general, the status of Chinese applying for admission must *first* be determined in accordance with the terms of that law and of the regulations drawn in pursuance thereof; then, if found admissible under such law and regulations, their status under the Chinese-exculsion laws and regulations shall be determined. In order to avoid inconvenience, delay, or annoyance to Chinese applicants arising through misunderstanding, and in the interest of good administration, examination under both sets of laws and regulations shall be made, in the order stated, only at the ports named in rule 1 hereof.

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